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INTRODUCTION

During the past decade, much international attention has focused on the Third World demand for a New International Economic Order (NIEO).[1] This effort to restructure the world economy with a view towards enhancing the competitive position of the Less Developed Countries (LDCs) has been fueled by the recent rapid increase in the number of such countries.[2] It has gained increasing importance as western international economic relations have gone through a decade of continuing crisis causing the world

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1. The Declaration on Establishment of a New International Economic Order was adopted by the United Nations General Assembly on May 7, 1974. G.A. Res. 3201 (S-VI), 6th Special Session, GAOR, Supp. (No.1), U.N. Doc. A/9559 (1974), *reprinted in* 13 INT'L LEGAL MATERIALS 715, 720, 737 (1974). The Declaration was followed rapidly by the Programme of Action for a New International Economic Order, U.N. Doc. A/RES/3202 (1974) and the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), 29th Sess., GAOR, U.N. Doc. A 19946 (1974), *reprinted in* 14 INT'L LEGAL MATERIALS 251 (1975). For a recent discussion of the NIEO, *see* M. BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); R. PREBISCH, EL NUEVO ORDEN ECONOMICO INTERNACIONAL Y VALORES CULTURALES (1978); Ferguson, *The New International Economic Order,* 1980 U. ILL. L.F. 693; Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation,* 12 LAW. AM. 1 (1980). There have been more than 700 studies by U.N. specialized agencies, 600 books, and 1,600 scholarly articles focusing on the New International Economic Order. *See* The New International Economic Order: A Selective Bibliography, U.N. Doc. ST/LIB/SER.B/30.

2. The Group of 77, formed in 1968 to represent Third World interests in the United Nations, numbered 110 in 1978 and has been gaining members since then. *See* Finnegan, *A Code of Conduct Regulating International Technology Transfer: Panacea or Pitfall?,* 60 J. PAT. OFF. SOC'Y 71 (1978).

economy to suffer instability.[3]

The debate over the NIEO has largely been perceived as a struggle between the LDCs and western developed capitalist (market economy) nations. The Soviet Union and other socialist (centrally planned) nations have, despite pointed rhetorical support for the Third World, generally been on the side-lines,[4] while western nations have been the focus of continuing verbal attack. Claiming not to be motivated by profit, socialist countries have projected an image of being non-exploitative in their relations with developing nations and therefore outside the parameters of the North-South dialogue on the NIEO.[5] The relative economic weakness of the socialist nations, as compared to the western industrialized nations, is another factor which has made their inclusion in the North-South dialogue of lesser significance to Third World negotiators.[6]

Third World interest in the NIEO has been based on the desire to correct what are perceived as structural inequities preventing expanded membership in the world of the "haves."[7] Developed nations have been unable to ignore demands for restructuring the

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3. *See* M. BEDJAOUI, *supra* note 1, at 40; The Report of the Independent Commission on International Development Issues (under the Chairmanship of Willy Brandt), NORTH-SOUTH: A PROGRAM FOR SURVIVAL 7-35 (1980) [hereinafter cited as Brandt Commission].

4. Ewing, *UNCTAD and the Transfer of Technology*, 10 J. WORLD TRADE L. 197, 201 (1976). Rejecting the division of the world's nations into North and South, Soviet President Leonid Brezhnev stated:

> In our view, the real danger lies in the attempts to divide the non-aligned countries from the socialist countries, to set the non-aligned countries against the socialist States and deprive the developing States of their natural and staunchest allies. We believe that the main dividing line in the world of today does not lie between the big and small, rich and poor countries, but between the forces of socialism, progress and peace and those of imperialism, colonialism and reaction opposing them.

Message addressed by Brezhnev to Boumediene on the eve of the fourth Algiers conference, *quoted in* M. BEDJAOUI, supra note 1, at 34 n.2.

5. *See* Fomin, *The New International Economic Order as Viewed in the CMEA Countries*, in EASTERN EUROPE AND THE NEW INTERNATIONAL ECONOMIC ORDER (E. Laszlo & J. Kurtzman eds. 1980). For an example of the Soviet effort to define itself outside of the North-South conflict, *see* Bykov, Strepetova & Letenko, UNITAR Research Report No. 15: *Soviet Experience in Transfer of Technology to Industrially Less Developed Countries* (1973) [hereinafter cited as *Soviet Experience*]. For a view that Third World perceptions of the socialist bloc are beginning to be more critical, *see* Brandt Commission, *supra* note 3, at 45-46.

6. *See* CONGRESSIONAL RESEARCH SERVICE, Soviet Policy and the United States Response in the Third World 34, (a report prepared for the House Comm. on Foreign Affairs) (March 1981) [hereinafter cited as *Soviet Policy*].

7. *See generally* M. BEDJAOUI, supra note 1.

global economy because LDCs are important suppliers of raw materials and, if they were able to grow in prosperity, potentially important markets for western surplus production.[8] It is assumed that "rising prosperity in the poor countries expands world trade and therefore feeds the growth of incomes in both halves of the world."[9]

The demand for the NIEO, based upon the so-called "right to development,"[10] has included as one of its most central elements a demand for restructuring mechanisms for transfer of technology to developing nations.[11] Most developing countries are aiming for rapid economic growth and industrialization, captivated by the allure of materialism.[12] Modern technology is generally perceived as the key to leap-frogging a long, slow period of incremental development on the road to modern economic viability.[13] This perception, in turn, leads LDC planners to the conclusion that "the technological gap between the rich and the poor countries lies at the root of the economic distance between these two areas."[14]

The overwhelming majority of transfers of modern technology

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8. Jeffries, *Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT'L L.J. 309, 330 (1977); Note, *The Group of 77 Draft and Provisions Concerning Supplier Guarantees for the Proposed International Code of Conduct on Transfer of Technology*, 9 GA. J. INT'L & COMP. L. 69, 89 (1979). *See Soviet Policy, supra* note 6, at 28-29.

9. Ewing, *supra* note 4, at 213.

10. The right to development is one of the so-called solidarity rights which form the "third generation" of human rights. *See* Vasak, *Pour Les Droits de l'Homme de la Troisieme Generation: Les Droits de Solidarité*, in INTERNATIONAL INSTITUTE OF HUMAN RIGHTS, SUMMARY OF LECTURES—TENTH STUDY SESSION (1979).

11. *See* Ewing, *supra* note 4, at 197; Finnegan, *supra* note 2, at 115, 117; Jeffries, *supra* note 8, at 309; Note, *supra* note 8, at 69, 72, 104; *Transfer of Technology: An UNCTAD View*, 6 J. WORLD TRADE L. 252 (1972) (notes based on a report by the UNCTAD Secretariat) [hereinafter cited as *UNCTAD View*]. *See also* G.A. Res. 3202 (S-VI) of May 1, 1974.

12. "The infection of materialism is already deep in the Third World." Ferguson, *supra* note 1, at 704.

13. *See* Chudson, UNITAR Research Report No. 13: *The International Transfer of Commercial Technology to Developing Countries* 4 (1971); Ewing, *supra* note 4, at 197; Patel, *Transfer of Technology and Third UNCTAD*, 7 J. WORLD TRADE L. 226, 227 (1973); *UNCTAD View, supra* note 11, at 252.

The view that technology is the key to economic progress is based, in part, on the belief that technology played a central role in the growth of the developed nations' economies. Eighty-seven and one-half percent of the growth in U.S. per capita income between 1909 and 1949 has been attributed to "technological progress." Ewing, *supra* note 4, at 197 (citing Solow, *Technological Change and the Aggregate Production*, 39 REV. ECON. & STATISTICS (1957)).

14. Patel, *supra* note 13, at 227.

today emanate from Trans National Corporations (TNCs) based in western developed nations.[15] TNCs, long perceived in the Third World as the engines of imperialism, are, of course, not subjects of international law. Thus, it is the home countries of the TNCs, the developed western nations, that have become the target of international attempts to bring technology controlled by the TNCs within the grasp of the developing countries.

During the past ten years the United Nations Conference on Trade and Development (UNCTAD) has been sponsoring an effort to elaborate an International Code of Conduct on the Transfer of Technology.[16] In these negotiations, as in the rest of the North-South dialogue, the socialist nations have remained on the sidelines.[17] Despite self-professed support for radical restructuring of the global economy, ideological commitment to the fight against imperialism, and a growing role as an exporter of modern technology to developing countries,[18] the Soviet Union and the other socialist nations have only participated marginally in the development of the draft Code of Conduct for the Transfer of Technology. Nevertheless, it is possible to glean from the minimal socialist role in the negotiations an understanding of the true socialist perspec-

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15. Finnegan, *supra* note 2, at 71, 73; Jeffries, *supra* note 8, at 312. *See* Chudson, *supra* note 13, at 3. Lowenfeld, in attempting to define technology, points out that it "is something developed countries have. . . . [M]ost technology is in the possession of multinational enterprises." Lowenfeld, Understanding and Misunderstanding—Technology Transfer, Economic Development, and Restrictive Business Practices, Proc., 71st Ann. Meeting Am. Soc'y Int'l L. 224 (1977).

16. At the Third UNCTAD Conference, in May of 1972, a resolution was adopted calling for "a study for possible bases for new international legislation regulating the transfer from developed to developing countries of patented and non-patented technology." UNCTAD Res. 39 (III) at para. 9, *reprinted in* Patel, *supra* note 13 at 233-39. UNCTAD has produced, *inter alia*, two major studies: Report by the UNCTAD Secretariat: Major Issues Arising from the Transfer of Technology to Developing Countries, U.N. Doc. TD/13/AC.11/10/Rev. 2 (1975); and A Study by the UNCTAD Secretariat: The Possibility and Feasibility of an International Code of Conduct on Transfer of Technology, U.N. Doc. TD/B/AC.11/22 (1974). *See also*, Report by the UNCTAD Secretariat: An International Code of Conduct on Transfer of Technology, U.N. Doc. TD/B/C.6/AC.1/2/Supp.1/Rev.1. A draft code of conduct was produced at a 1974 Pugwash Conference, U.N. Doc. TD/B/AC.11/L.12 (1974) [hereinafter cited as Pugwash Draft], and, at the request of a Group of 77 representative, was circulated by UNCTAD at a 1974 session of the UNCTAD Intergovernmental Group on Transfer of Technology. For an excellent review of the Pugwash Draft, and its history, *see* Finnegan, *supra* note 2.

17. *See* note 4 *supra*.

18. *See Soviet Experience*, *supra* note 5. For an estimate of the volume of Soviet exports to developing nations, *see* note 44 *infra*.

tive on economic relations with developing countries. That will be the goal of this Article.

The Soviet Union and other socialist countries are both technology suppliers and recipients and thus have conflicting interests. As combatants in a long-term economic and ideological struggle with the West they verbally support Third World positions while adroitly managing to allow western negotiators to protect socialist technology supplier interests on specific Code issues.

I. TECHNOLOGY

Technology,[19] both patented and unpatented, relates to product, production process and facilities design, and management technique.[20] It includes franchise methodology, conventional technology, know-how, and high technology,[21] and is transferred through a variety of mechanisms. Among these transfer mechanisms are "direct investment, . . . joint ventures, licensing, management contracts, turnkey projects, and the installation and servicing of purchased industrial equipment."[22] Thus, technology can be transferred in embodied form as part of the sale of machinery or the provision of skilled technical assistance, or in unembodied form through licensing or other contractual relationships.[23]

Though there is suprisingly little hard data available concerning the transfer of technology,[24] the process is clearly rooted in the

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19. The author has grave doubts concerning the potential of technology as a panacea for underdevelopment and seriously questions the long-term viability of an international economic and social order based upon technologically enforced domination of the earth's resources and ecosystems. This is not meant to imply, however, that developed nations should or can deny to LDCs the benefits that accrue from technologization of society. Despite the author's doubts and questions, the East, West, and Third World all assume that technology is the key to the future, and this Article is predicated upon that assumption. An exploration of the limitations of a technologically based world order will have to await another article.

20. Chudson, *supra* note 13, at 3.

21. *Id.* at 12-20.

22. *Id.* at 1.

23. *See* Egea, *Multinational Corporations in the Operation and Ideology of International Transfer of Technology*, 10 STUD. COMP. INT'L DEV. 11 (1975); Ewing, *supra* note 4, at 197-98.

24. While TNCs undoubtedly possess much of this data, they do not, in general, make it available to prospective purchasers of technology or the public. This confronts a would-be purchaser with the following dilemma: purchase data, if it is available, which will inform him of whether he has the need to purchase the just-purchased data; or not purchase the data and never know whether it was needed. This has been called the "fundamental para-

infrastructure of the developed nations, where ninety-six percent of the total worldwide research and design expenditures are made.[25] Less than two percent of expenditures on research and development are made in developing countries[26] and, as a result, these countries are forced to spend substantial portions of their foreign currency reserves for the purchase of imported technology, thus increasing balance of payment pressures on already marginal national economies.[27] Payments for technology are for both direct and indirect (hidden) costs.[28]

Because of developed nation dominance of technology and the concomitant control over its transfer, developing nations remain technology-dependent. Though transfers to LDCs generate an extremely high rate of return on investment,[29] major technology flows

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dox." Egea, *supra* note 23, at 12. *See also* Jeffries, *supra* note 8, at 333; Note, *supra* note 8, at 97 n.99. "In a situation where competition is not perfect and there are elements of monopoly, technical information may be the most closely guarded aspect of modern production." *UNCTAD View, supra* note 11, at 253.

25. Brandt Commission, *supra* note 3, at 194. *See also* Ewing, *supra* note 4, at 198; Note, *supra* note 8, at 75.

26. Ewing, *supra* note 4, at 198; Note, *supra* note 8, at 75.

27. *UNCTAD View, supra* note 11, at 256; Note, *supra* note 8, at 76. Foreign exchange costs to LDCs for technology transfers were estimated at $1.5 billion for 1968 and were projected to reach $9 billion by the end of the 1970's. *UNCTAD View, supra* note 11, at 261-64; Patel, *supra* note 13, at 230. For six LDCs studied, total payments for technology amounted to seven percent of combined exports. Note, *supra,* note 8, at 77, citing UNCTAD, Transfer of Technology, U.N. Doc. ST/ECA/190 (1973). "[F]oreign exchange costs of the transfer of technology were increasing much more rapidly than other sectors of the economies of the developing countries. The direct costs of the transfer have, in general, increased about two and one-half times faster than manufacturing output in the developing countries." Patel, *supra* note 13, at 228.

28. *See* Egea, *supra* note 23, at 12; Jeffries, *supra* note 8, at 315 n.30. Among the costs for imported technology involving foreign exchange payments are the following:

> (i) the right to use patents, licenses, know-how and trademarks;
> (ii) technical knowledge and know-how needed both in the pre-investment and investment stage and in the operation stage;
> (iii) over-pricing of imports of intermediate products and equipment;
> (iv) profits on capitalization of know-how (acquisition of equity participation in place of other means of payment for transfer technology); profits on these equity holdings are therefore to be regarded as, in part, payments for the transfer of technology;
> (v) a portion of repatriated profits of the wholly-owned subsidiaries or joint ventures which do not make specific provision for payments for the transfer of technology;
> (vi) imports of capital and other technical equipment, the price of which usually allows for the exporter's valuation of the cost of technology.

UNCTAD View, supra note 11, at 257.

29. *E.g.,* the rate of return for U.S. direct investment in Third World countries is

remain among developed nations. Developing nations are involved in only ten percent of all technology transfers[30] and continue to be denied access to the technology they desire.

TNCs, approximately ninety percent of which are U.S. based,[31] are protected by developed nations' laws[32] and are little concerned with the need for development of Third World nations.[33] Their motivation is for short-term profit and long-term security.[34] When LDCs negotiate technology transfers with TNCs they are faced with the overwhelmingly superior strength of TNCs; TNCs play the technology transfer game with nearly all of the cards in their hands. In general, they understand both technology and the negotiating process far better than their Third World counterparts. It is this unequal bargaining relationship that is at the heart of technology transfer inequities and that the Code of Conduct seeks to redress.

II. COMPARATIVE ADVANTAGE

For much of this century, especially since the Bretton Woods Agreement that followed the end of World War II, the international economy has been purportedly based on the theoretical model of comparative advantage.[35] According to this theory, the international division of labor should be structured so each nation makes that which, when compared to other nations, makes best and cheapest, with each product produced where there is a relative economic advantage to it being produced. Further, the theory suggests, a free trade model,[36] as more or less embodied in the General

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double that of investment in developed countries. Note, *supra* note 8, at 75.

30. *See* UNCTAD, *Report of the Intergovernmental Group of Experts on a Code of Conduct on Transfer of Technology*, U.N. Doc. TD/B/C.6/1 (1975) [hereinafter cited as *Experts' Report No. 1*]; Jeffries, *supra* note 8, at 340; Note, *supra* note 8, at 75.

31. Comment, *The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining*, 11 SAN DIEGO L. REV. 206, 209 (1973) [hereinafter cited as *Trading with the Enemy*].

32. *See* Jeffries, *supra* note 8, at 325.

33. *See* the materials cited in note 34 *infra*.

34. *See* Egea, *supra* note 23, at 11, 28; Finnegan, *supra* note 2; Jeffries, *supra* note 8, at 310, 314, 335; Matsui, *The Transfer of Technology to Developing Countries: Some Proposals to Solve Current Problems*, 59 J. PAT. OFF. SOC'Y 612 (1977).

35. *See generally* A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE (1979) [hereinafter cited as LOWENFELD, PUBLIC CONTROLS].

36. *Id.* at 5.

Agreement on Tariffs and Trade,[37] will most effectively accomplish these ends. Critics respond that present structures of trade simply institutionalize the position of advantage gained by western developed nations during the era of imperialism and exploitation that is only now beginning to come to an end.[38] This difference of analysis provides a useful framework within which the technology transfer negotiations can be understood.

Western developed nations argue that unless they and their TNCs have an incentive to continue doing what they do best, developing and selling technology, the entire international economy will suffer from the gross inefficiency that results from deviation from the comparative advantage model. The Third World argues that the present division of labor does not take advantage of the potential *future* comparative advantages that could be developed if the international economy were restructured so that comparative disadvantages produced by the present system of exploitation were remedied. In the end, the dispute is based upon whether one uses present comparative advantages or potential future comparative advantages to guide Code negotiations.

The question underlying the Code negotiations is: can the present imbalance in the power relationship between developed and developing countries be sufficiently remedied so that developing countries will be able to develop to their full potential thereby benefitting themselves and the entire world economy? Using an international version of trickle-down theory, the western nations would state the underlying issue as follows: can the present network of comparative advantages be used to their maximum benefit to enrich the entire world economy, thus benefitting the developing nations? One is forced to wonder, especially after studying the history of the Code negotiations, whether the true position of developed nations is to defend and perhaps even extend current advantages to continue benefitting themselves to the maximum extent possible. The West seems to negotiate out of self-interest, not for mutual interest.

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37. 61 Stat. (5) & (6), T.I.A.S. No. 1700, 55 U.N.T.S. 194. For a listing of the eight protocols modifying the GATT, *see* LOWENFELD, PUBLIC CONTROLS, *supra* note 35, at 28.

38. *See, e.g.*, M. BEDJAOUI, *supra* note 1, at 23, 24.

III. The Soviet Union and Technology Transfer

Though the UNCTAD-sponsored negotiation of an International Code of Conduct on the Transfer of Technology has received a great deal of attention in the academic literature,[39] the role of the Soviet Union and other socialist nations in these negotiations has barely been mentioned by commentators.[40] Little is known, or at least little is reflected in western literature, concerning the details of the extent of or mechanisms for socialist transfer of technology to developing nations.[41] A study commissioned by the United Nations Institute for Training and Research and carried out by three leading Soviet academics,[42] does offer some insight, however, into the Soviet view of its own practice in this area.

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39. *See, e.g.*, Byrne, *Transfers of Technology to Developing Nations*, NEW L.J., March 29, 1979; Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273, 293 (1977); Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247, 249 (1978); Dessemontet, *Transfer of Technology Under UNCTAD and EEC Draft Codifications: A European View of Choice of Law Licensing*, 12 J. INT'L L. & ECON. 1 (1977); Egea, *supra* note 23; Ewing, *supra* note 4; Finnegan, *supra* note 2; Goekjian, *Legal Problems of Transferring Technology to the Third World*, 25 AM. J. COMP. L. 565 (1977); Jeffries, *supra* note 8; Matsui, *supra* note 34; Patel, *supra* note 13; Roffe, *UNCTAD: Code of Conduct on Transfer of Technology: A Progress Review*, 12 J. WORLD TRADE L. 351 (1978) [hereinafter cited as *Progress Review*]; Zuijdwijk, *The UNCTAD Code of Conduct on the Transfer of Technology*, 24 MCGILL L.J. 562 (1978); Note, *supra* note 8; Note, *United Nations: International Regulation of Transnational Corporations*, 13 J. WORLD TRADE L. 55 (1979) [hereinafter cited as *International Regulations*]; Proc., Am. Soc'y Int'l L., 71st Ann. Meeting, 224 (1977) [hereinafter cited as ASIL Proceedings]; *UNCTAD View, supra* note 11.

40. Though the absence of treatment of a subject in the literature is difficult to illustrate, suffice it to say that, with one exception, the role of the socialist nations in the Transfer of Technology Code negotiations has rarely been given more than mention in a footnote, or at most in a sentence or a brief paragraph in the literature on the negotiations. *See* the material cited in note 39 *supra*. The one exception is the 1978 progress report by Pedro Roffe, a staff member of the UNCTAD Transfer of Technology Division, writing in his personal capacity. *See Progress Review, supra* note 39. Writing shortly after the belated presentation of the first socialist Draft Code, *see* note 76 *infra*, Roffe uncritically presents a useful synopsis of the socialist position.

41. While there has been some treatment of Soviet trade practices, especially since the resumption of trade with the West, *see* text & accompanying notes 60-63 *infra*, there has not, in general, been specific treatment of the details of technology transfer to developing nations. *See, e.g.*, A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 148-257 (1977) [hereinafter cited as LOWENFELD, TRADE CONTROLS] and the materials cited therein.

42. *Soviet Experience, supra* note 5. The authors are Doctor of Economics A.N. Bykov, of the Institute of Economics of the World Socialist System of the Academy of Science of the U.S.S.R., Doctor of Economics M.P. Strepetova, and Research Scholar of the Institute A.V. Letenko.

It is generally agreed that among socialist nations the Soviet Union is the dominant force in technology transfers.[43] Having only recently emerged as an active participant in international technical exchanges,[44] the Soviets nonetheless claim to benefit from a wealth of technology transfer experience based upon the development of their constituent national republics "on the outskirts of Russia."[45] Rejecting autarchy,[46] which in the past had been part of their national ideology, the Soviets now see themselves "striving for active participation in the international division of labour and all-around economic cooperation with other countries on the basis of full equality of the parties concerned, non-interference in the internal affairs of other states, respect for national sovereignty and national interests and mutual advantage."[47]

International transfer of technology practice by the Soviet Union reflects the state planning and monopoly of foreign trade characteristic of socialist (centrally-planned) economies.[48] Al-

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43. "Thanks to scientific and technical cooperation socialist countries have acquired an opportunity to use, on exceptionally favourable terms, a wealth of scientific and technical experience accumulated by the socialist commonwealth, the Soviet Union above all." *Soviet Experience, supra* note 5, at 62. In general, the Soviets transfer technology to other socialist nations without charge under intergovernmental agreements with the members of the Council for Mutual Economic Aid (COMECON). The Soviets, however, have "concluded additional agreements providing for the transfer of technical documents . . . on the basis of certain reimbursement . . . [with] a number of more advanced socialist countries (Hungary, the German Democratic Republic and Czechoslovakia)." *Id.* at 63. For a resume of the "Transfer of Soviet Technology to Socialist Countries," *see id.* at 75-104.

44. Congressional Research Service, *Soviet Scientific and Technical Cooperation with Countries other than the United States* (a report prepared for the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology) 1 (Feb. 1979) [hereinafter cited as *Soviet S & T*]. The Soviets see the 1950's and 60's as the time when they grew to active participation in international technical exchanges. *Soviet Experience, supra* note 5, at 9. By 1970, however, the total volume of Soviet exports to LDCs amounted to more than 2 billion dollars (computation based on data provided in *Soviet Experience, supra* note 5, at 104-05, and the currency conversion rate of 1.1 rubles to the dollar, [1970] WORLD ALMANAC & BOOK OF FACTS 559 (Long ed. 1970)).

45. *Soviet Experience, supra* note 5, at 8-9. For a treatment of "Scientific and Technical Development of Soviet National Republics Economically Backward in the Past," including the transfer of technology thereto, *see id.* at 13-23. The curious term "on the outskirts of Russia" is found with some frequency in this Soviet-authored UNITAR report. *See, e.g., id.* at 13, 17, 19.

46. *Soviet Experience, supra* note 5, at 24. For a review of changing Soviet attitudes concerning the principle of autarchy, *see* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 148-60.

47. *Soviet Experience, supra* note 5, at 24.

48. *See* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 151-63.

though supervision of foreign economic relations is entrusted to several state bodies,[49] direct contacts with foreign enterprises are accomplished through state-run foreign trade organizations,[50] which are all-union corporations that conduct business on their own behalf.[51] Technology is, of course, state-owned,[52] and its transfer to socialist and non-socialist states occurs according to different rules.[53]

The Soviets transfer technology through a variety of mechanisms,[54] the most important of which is the intergovernmental agreement on economic and technical cooperation.[55] Although willing to transfer technology on normal commercial terms with private enterprises,[56] the Soviets prefer to conclude contracts,

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49. The state bodies with responsibility for supervision of international economic relations are: the U.S.S.R. Council of Ministers, Ministry for Foreign Trade, Ministry for Foreign Affairs, the State Committee for Science and Technology, and the State Committee for Foreign Economic Relations of the U.S.S.R. Council of Ministers which has specific responsibility for economic and technical assistance to foreign nations. *See Soviet S & T, supra* note 44, at 5-7.

50. Lowenfeld reports that in 1975 there were approximately 60 foreign trade organizations in the Soviet Union. LOWENFELD, TRADE CONTROLS, *supra* note 41, at 157. *Accord, Soviet S & T, supra* note 44, at 6. *Soviet Experience, supra* note 5, at 27-32, cites only twelve as engaging in the transfer of technology through export.

51. The Soviets recognize foreign trade organizations as independent legal persons and apparently make no claim of sovereign immunity for them though they are state owned and controlled. *See Soviet Experience, supra* note 5, at 27.

52. *See Soviet S & T, supra* note 44, at 4.

53. *Soviet Experience, supra* note 5, at 60.

54. Among the ways the Soviet Union transfers technology to developing countries are the following: "deliveries of equipment, construction of industrial and other projects, prospecting, design and research work, transfer and selling of licenses and technical know-how, help in training national personnel and development of the scientific and technical infrastructure." *Soviet Experience, supra* note 5, at 25. These are accomplished through intergovernmental agreements on economic and technical assistance, special intergovernmental agreements relating to individual projects, joint ventures, and through usual commercial terms outside the framework of intergovernmental agreements. *See id.* at 38-56. The major differences between technology transfers via intergovernmental agreements and via commercial non-governmental agreements are in the mechanisms for drawing up and registering the forms of assistance and the higher prices for commercial relationships. *Id.* at 56.

55. The transfer of Soviet technology to other countries is usually regulated by intergovernmental agreements. "In 1970 the U.S.S.R. had such agreements with all socialist countries, and also with 40 developing countries." *Soviet Experience, supra* note 5, at 39. *See also* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 156-65. In 1979 the Congressional Research Service reported that the Soviet Union had concluded 64 economic and technical cooperation agreements with developing countries. *Soviet S & T, supra* note 44, at 10. For a list of some of these countries, *see id.* at 91-109.

56. Technical assistance to developing countries on commercial terms has been expanding and is available to state organizations or private firms "if it answers the national

whether with private or state bodies, in conformity with "General Conditions" established by prior intergovernmental agreement. These "General Conditions . . . determine the rights and obligations of the supplier and customer"[57] with regard to a long list of issues normally settled by westerners in the contract proper.

The Soviets perceive their role in the international transfer of technology as clearly distinguishable from the role of western capitalist nations.[58] Claiming to be responsive to a whole host of Third World concerns,[59] the Soviets further claim to believe that they see "turning economically less developed countries into modern industrial-agrarian states with diversified national economies and a high level of technological development as the most important aspect of technical assistance."[60] Judged by their behavior in the Transfer of Technology Code negotiations, it appears likely their true motivations are somewhat less altruistic.[61]

A picture of Soviet practice and interests in the international

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interests of a developing country and is implemented on a *mutually advantageous* basis." *Soviet Experience, supra* note 5, at 55 (emphasis added).

57. *Id.* at 42-43. Among the issues usually settled by the "General Conditions" are the following: collection of initial design data, delivering equipment and materials, manpower responsibilities, customer guarantees, provision of technical documents, provision of training specialists, guarantees of patent purity, project deadlines, reclamation procedures, etc. Thus, in technology transfers operating under intergovernmental agreements, all that is left for the contract is "to agree on the quantity and nomenclature of the equipment and materials to be supplied, as well as the costs [and] deadlines for deliveries . . . ." *Id.* at 43.

58. *E.g.*, "[T]he principles, methods and ways of transfer of technology by the Soviet Union to other countries substantially differ from those practiced by the capitalist countries." *Id.* at 8. "The experience of the transfer of Soviet technology to developing countries convincingly shows that the Soviet Union, as a socialist state where the basic means of production are nationalized, . . . has the decisive advantage over the capitalist countries, where the major seats of technical progress are in the hands of the biggest companies and firms." *Id.* at 185.

59. Throughout the entire UNITAR report on Soviet transfer of technology the Soviet authors cite a large number of Third World needs, desires, and demands to which, they repeatedly assert, Soviet transfer mechanisms are responsive. Among these are the following: the need to take local conditions into account, free transfer of technical documents, long-term, low-interest credit, the most modern technology, favourable terms, no licensor control over licensee production and exportation, the use of local labor and materials, training of local personnel, treatment as sovereign equals, non-interference in internal affairs and an absence of demands for political or economic concessions. *See id.*

60. *Id.* at 40.

61. *See* text & accompanying notes 101-26 *infra*. For one account describing effects of Soviet technology transfer practice similar to those of TNC practice, *see* UNCTAD, *Major Issues Arising from the Transfer of Technology: A Case Study of Sri Lanka*, U.N. Doc. TD/B/C.6/6.

transfer of technology would not be complete without comment on the import side of the relationship. After a prolonged period of no trade with the West, the Soviets, with the death of Stalin, showed renewed interest in such trade.[62] The 1960's can be characterized as the epoch of establishing trade relations with Western Europe[63] and, in the 1970's, this process was extended to the United States.[64] The Soviets have shown interest in both high technology needed to modernize their industry[65] and in technology needed to produce western-style consumer goods which have become attractive to the Soviet people.[66] Whether detente was accomplished to ease the way for trade relations, or whether trade relations were meant to cement the political advances of the Soviet Union reflected in detente, is not entirely clear.[67] Nevertheless, Soviet interest in access to western technology has been strong and maintenance of ready access has become a major goal of Soviet foreign policy.[68]

As has been typical of Soviet ideological rationalization since the revolution of 1917, the Soviets still seem to believe that what is good for the Soviet Union is good for the world communist revolution and the struggle against imperialism.[69] It is believed that access to western technology will benefit the economy of the Soviet Union thereby ensuring survival of and success for the on-going Soviet Revolution and the world-wide revolutionary movement of which the Soviet Union purports to be the vanguard.

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62. *See* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 148; Note, *An Overview of Export Controls on Transfer of Technology to the U.S.S.R. in Light of Soviet Intervention in Afghanistan*, 5 N.C.J. INT'L L. & COM. REG. 555, 557-58 (1980) [hereinafter cited as *Export Controls*].

63. *See* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 149.

64. *See generally* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 149, 173-257; Note, *U.S. Technology Transfers to the Soviet Union and the Protection of National Security*, 11 L. & POL'Y INT'L BUS. 1037, 1039-50 (1979) [hereinafter cited as *U.S. Technology Transfers*].

65. *E.g.*, computers, lasers, microprocessing equipment, and oil and gas drilling equipment. Wall St. J., Jan. 7, 1980, at 3, col. 3.

66. *E.g.*, Pepsi Cola.

67. *See* LOWENFELD, TRADE CONTROLS, *supra* note 41, at 160.

68. For a brief American view of the effects of western technology on the Soviet Union, *see Soviet S & T*, *supra* note 4, at 7-8. For a review of East-West technology transfers, *see generally* E. ZALESKI & H. WEINERT, TECHNOLOGY TRANSFER BETWEEN EAST AND WEST (1980).

69. *See Soviet Policy*, *supra* note 6, at 29-30.

IV. The Transfer of Technology Code Negotiations

The United Nations Conference on an International Code of Conduct on the Transfer of Technology has held sessions in 1975, 1978, and 1980. The bulk of the work, however, has been conducted at intersessional meetings of the Intergovernmental Group of Experts.[70] The negotiating process has been organized according to the usual U.N. practice of consolidating states into relatively like-minded negotiating units: China, Group B (western developed nations), Group of 77 (developing nations—numbering in excess of 110), and Group D (the Soviet Union, the socialist countries of Eastern Europe and Mongolia).[71]

Based on a Pugwash draft,[72] the original Draft Code of the Group of 77 was presented in May of 1975.[73] Group B, upset by the fact that the Group of 77 had presented a negotiating draft which exhaustively treated all items at issue,[74] responded with its own draft.[75] The Group of 77 and Group B offered revised drafts in

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70. *See Experts' Report No. 1, supra* note 30; UNCTAD, *Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Second Session,* U.N. Doc. TD/AC.1/7 (1977) [hereinafter cited as *Experts' Report No. 2*]; UNCTAD, *Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Third Session,* U.N. Doc. TD/AC.1/9 (1977) [hereinafter cited as *Experts' Report No. 3*]; UNCTAD, *Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Fourth Session,* U.N. Doc. TD/AC.1/11 (1977) [hereinafter cited as *Experts' Report No. 4*]; UNCTAD, *Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Fifth Session,* U.N. Doc. TD/AC.1/15 (1978) [hereinafter cited as *Experts' Report No. 5*]; UNCTAD, *Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology,* U.N. Doc. TD/AC.1/18/Add.1 (1978) [hereinafter cited as *Experts' Report No. 6*]. The Intergovernmental Group of Experts, in turn, functions through working groups. *Progress Review, supra* note 39, at 352.

71. China, which has generally been supportive of the Group of 77 in the negotiating process, is not dealt with in this Article.

72. *See* note 16 *supra.*

73. Text of the Draft Outline for the Preparation of an International Code of Conduct on Transfer of Technology as originally submitted by the expert from Mexico on behalf of the experts from the Group of 77, U.N. Doc. TD/B/C.6/L.1/Rev.1, (1975) [hereinafter cited as Group of 77 1975 Draft]. Shortly after submitting this draft, the Group of 77 offered a revised version. *See* Revised Draft Outline for the Preparation of an International Code of Conduct on Transfer of Technology submitted by the expert from Brazil on behalf of the experts from the Group of 77, U.N. Doc. TD/B/C.6/1 Annex III (1975), *reprinted in* 14 Int'l Legal Materials 1333 (1975) [hereinafter cited as Group of 77 1975 Revised Draft].

74. *See Experts' Report No. 1, supra* note 30, at 11-12 (statement of the spokesman for the experts from developed countries, members of Group B).

75. Draft Outline for the Preparation of an International Code of Conduct on Transfer

1977, at which time Group D finally offered its own Draft Code of Conduct.[76] Composite negotiating texts were prepared by the UNCTAD Secretariat in 1978, after the second session of the Conference, and in 1980, after the close of the third session of the Conference.[77] These composite negotiating texts present code language tentatively agreed upon by representatives of the four negotiating units and parenthetically offer the various proposals with regard to those portions of the Code remaining unsettled.

A. *The Negotiating Framework*

While the code negotiations aim to improve developing country access to technology and thus increase the rate of economic growth and "eradicate poverty, illiteracy and inequality,"[78]

> it is equally essential that the technology receiving countries are not overburdened with such unbearable costs that their external balance of payments would become severly strained; with such restrictive conditions in transfer agreements that their potential for exporting products would not be developed; or with such technology as is not suited to their own factor endowment at present and to the requirements for growth over the years to come.[79]

Economically beneficial full access to technology, then, it is agreed, is the Code's broad goal. Disagreements, however, have occurred with regard to the detailed inter-related issues of restrictive busi-

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of Technology submitted by the expert from Japan on behalf of the experts from Group B, U.N. Doc. TD/B/C.6/AC.1/L.2 (1975), *reprinted in* 14 INT'L LEGAL MATERIALS 1329 (1975) [hereinafter cited as Group B 1975 Draft].

76. Revised Text of Draft Outline of an International Code of Conduct on Transfer of Technology submitted on behalf of the experts from the Group of 77, U.N. Doc. TD/AC.1/11 Annex II (1977) [hereinafter cited as Group of 77 1977 Draft]; Revised Outline of a Code of Conduct Consisting of Guidelines for the International Transfer of Technology submitted on behalf of the experts from Group B, U.N. Doc. TD/AC.1/11 Annex III (1977) [hereinafter cited as Group B 1977 Draft]; Revised Outline of the Draft Code of Conduct for the Transfer of Technology as suggested by experts from . . . [Group D], U.N. Doc. TD/AC.1/11 Annex IV (1975) [hereinafter cited as Group D 1977 Draft]. These drafts are *reprinted in*, respectively, 17 INT'L LEGAL MATERIALS 462, 473 & 481 (1978). Useful synoptic tables appear at U.N. Doc. TD/AC.1/11 Annex V & Annex VI (1977).

77. UNCTAD, Draft International Code of Conduct on the Transfer of Technology as of 11 November 1978, U.N. Doc. TD/CODE TOT/9 (1978), *reprinted in* 17 INT'L LEGAL MATERIALS 453 (1978) [hereinafter cited as Composite 1978 Draft]; UNCTAD, Draft International Code of Conduct on the Transfer of Technology as at the close of the third session of the Conference on 6 May 1980, U.N. Doc. TD/CODE TOT/25 (1980), *reprinted in* 19 INT'L LEGAL MATERIALS 773 (1980) [hereinafter cited as Composite 1980 Draft].

78. *UNCTAD View*, *supra* note 11, at 265.

79. Patel, *supra* note 13, at 226.

ness clauses[80] (including those involving "packaging" of technology[81]), supplier guarantees,[82] and the applicable law for dispute resolution.[83] In the end, the most fundamental issue is the binding or non-binding nature of the Code.[84]

The negotiations have taken place within the UNCTAD policy perspective of seeking to establish an international regulatory framework, encourage unpackaged transfers, improve access at fair and reasonable prices, ensure effective performance of transfer arrangements, and develop indigenous technological capacities.[85] Despite apparent acceptance by Group B and Group D nations of these shared UNCTAD and Group of 77 objectives,[86] the in-fighting as to precisely which elements of present transfer mechanisms need reform, and how those reforms should be effected, has been fierce.

The negotiating position of Group B nations has been based on a "you can't get there from here" critique of the Group of 77 plan.[87] The Group B nations, in the Code negotiations, function as representatives of the TNCs and seem to make every effort to maintain the status quo.[88] They argue, sometimes persuasively,

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80. The heart of the draft codes is the chapter on restrictive business practices, *see* Finnegan, *supra* note 2, at 81, and "many of the objectives sought to be achieved by the developing country enterprises are the same as, or analogous to, those at which the antitrust laws [of developed nations] are aimed." *Id.* at 78. Finnegan presents an excellent review of the issues involved in the negotiation of the restrictive business practices chapter, including those relating to the following practices: tie-in clauses, package licensing, tie-out clauses, price-fixing, production volume restraints, export restrictions, field of use restrictions, unilateral grant-back provisions, limitations on transferee research and development, quality control clauses, exclusive sales or representation agreements, non-currency royalty payments, licensor participation in management clauses, attempts to exact royalty payments in the absence of valid property rights, restrictions on use after expiration of agreements, and clauses requiring continuation of payments for unused technology. *Id.* at 84-103.

81. The packaging of technology requires developing nations to purchase undesired technology along with desired technology. It often requires them to take the worst along with the best, the expensive along with the inexpensive, and the unsuited along with the well-adapted technology.

82. *See* Finnegan, *supra* note 2, at 103-10.

83. For a review of the issues relating to the question of applicable law, *see* Dessemontet, *supra* note 39.

84. *See* text & accompanying notes 110-18 *infra*.

85. *See* Ewing, *supra* note 4, at 200.

86. "The spokesman for Group B said that the members of his Group shared the objectives outlined by the spokesman for the Group of 77 . . . ." *Experts' Report No. 2, supra* note 70, at 4.

87. For one articulation of this critique, *see* Jeffries, *supra* note 8, at 329.

88. *Id.* at 315.

that international regulation of technology transfer will not be effective unless it allows the TNCs sufficient return on investment to provide incentive for engaging in research and development work and comparable incentive for then transferring the results of that work to developing nations.[89] They contend that any regulation which limits profits by infringing upon the basic property rights of the TNCs will, in the end, be dysfunctional.[90] Group of 77 nations respond that unless the status quo is radically altered the Code will be useless. Repeatedly citing the need to have their grievances redressed and the New International Economic Order established, the Group of 77 presses for its desired reforms and appears to ignore the issue of incentives. The power of the Group B negotiating position is countered by the obstinacy of the Group of 77 negotiators.

B. The Group B Negotiating Position

The Group B commitment to representation of TNC interests and maintenance of current advantages has led to the articulation of several politically untenable, or at least transparent, negotiating positions. For example, Group B nations, while strongly backing a legally binding international code of conduct on corrupt business practices,[91] have insisted that the technology transfer code must be of a voluntary nature because a binding code would allegedly be unworkable.[92] Furthermore, even within the context of their nonbinding draft, the Group B negotiators consistently insist on "should" rather than "shall" in describing TNC obligations in the transfer process.[93] With regard to the chapter on restrictive business practices the Group B negotiators have opposed many proscriptions that are already embodied in the national legislation of many of the group's member nations, thus appearing desirous of allowing certain corporate conduct in developing nations which has already been declared impermissible in developed nations.[94] In re-

89. For a presentation of this argument, *see* Finnegan, *supra* note 2.

90. For an excellent example of this argument, *see* Matsui, *supra* note 34.

91. Davidow & Chiles, *supra* note 39 at 249 n.10.

92. *See id.* at 254. *See also* U.N. Doc. E/C.10/SR.19 (1976), at 2.

93. *See* text & accompanying notes 114-18 *infra.*

94. For a comparison of the Group B negotiating position on restrictive business clauses and developed countries' municipal legislation on the same subject, *see* Finnegan, *supra* note 2, at 84-103.

sponse to the Group of 77 demand that the law applicable to disputes concerning technology transfer agreements be the law of the technology receiving nations,[95] Group B insists that the parties to an agreement be permitted to negotiate the applicable law as part of the agreement,[96] thus continuing to ignore the lack of bargaining power of developing countries that led to the call for a code of conduct in the first place. With regard to the issue of unpackaging transferred technology, the Group B 1975 Draft did not even address the issue[97] and the Group B 1977 Draft went only so far as to propose that "[s]ource enterprises *should* . . . be responsive to inquiries about the unpackaging of transferred technology."[98] This certainly was not responsive to the modest Group of 77 proposal prohibiting packaging arrangements that require, as a condition for obtaining the desired technology, acceptance of additional technology not desired by the recipient or needed in the recipient country.[99]

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95. The 1975 draft of the Group of 77 provided: "Technology transfer arrangements shall be governed, with regard to their validity, performance and interpretation, by the laws of the technology-receiving country. The technology-receiving country shall exercise legal jurisdiction over the settlement of disputes pertaining to transfer of technology arrangements between the parties concerned." Group of 77 1975 Draft, *supra* note 73, at 14.

96. In 1977 Group B offered the following language:

> The parties to a technology transfer agreement should be permitted freely to choose the law governing the validity, performance and interpretation of the agreement, provided that the State whose law is chosen either has a substantial relationship to the parties or to the transaction or there is other reasonable basis for the parties' choice. The parties should also be permitted to leave the issue of governing law for decision by the forum before which a dispute relating to a transfer of technology is tried . . . . The parties to a technology transfer agreement should be freely permitted to choose the forum before which disputes relating to the agreement shall be tried, and any such choice should be given effect unless there is no reasonable basis for the selection and the choice places an onerous burden on one of the parties.

Group B 1977 Draft, *supra* note 76, at 15.

97. *See* Group B 1975 Draft, *supra* note 75.

98. Group B 1977 Draft, *supra* note 76, at 8 (emphasis added). The Group B proposal continued with recognition "that there are instances where the success of a technology rests in its application as a whole." *Id.*

99. In 1975 the Group of 77 proposed that "[r]equiring the acceptance of additional technology not desired by the recipient or needed in the recipient country . . . as a condition for obtaining the technology required" shall be prohibited as a restrictive business practice. Group of 77 1975 Draft, *supra* note 73, at 5-6. In 1977 the Group of 77 offered language which would have prohibited "[d]esignating or restricting sources of technology, goods or services, or requiring acceptance of additional technology . . . not needed or not wanted by the acquiring party or the technology receiving country or limiting access to new technological developments, as a condition for obtaining the technology required." Group of

In summary, Group B negotiators can be said to have been stonewalling with regard to the significant issues. Insisting on a non-binding code, they go further and limit their language to a series of precatory statements that do not even begin to address seriously the issues raised by developing countries. Not only have Group B negotiators been unresponsive to Third World demands, but, worse yet, they have continually allowed themselves to appear unresponsive and thus have taken on the devil's mantle in the negotiating rooms.

C. Comparing the Negotiating Positions of East and West

In contrast to the overt foot-dragging of Group B negotiators, Group D negotiators have managed to protect their technology supplier advantages over Third World technology recipients without appearing exploitative. The socialists have succeeded in having western developed nations protect their supplier interests while appearing in the negotiations as anti-imperialist champions of the developing nations. They use the negotiations to press their political line of non-discrimination in technology transfer[100] in an effort to gain increased access to western technology[101] and have only a very limited number of other Code sections which they have made into priorities.[102] Beyond this, they have allowed the negotiations to be a battle between the West and the Third World and simply chimed in regularly with pro-Third World rhetoric. They appear to recognize that in a power contest between the West and the Third World, the West will surely win. Thus, where Group B and Group D supplier interests coincide, Group D, without suffering damage to its international political image, gains the benefit of the Group B defense of technology supplier interests.[103]

The adroitness and political sophistication of Group D negotiators can be seen through close scrutiny and analysis of their negotiating positions on fundamental issues debated during the course

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77 1977 Draft, *supra* note 76, at 8-9.

100. *See* text & accompanying notes 123-25 *infra*.

101. *See* text & accompanying notes 62-69 *supra*.

102. For examples of areas of Soviet concern, *see* text & accompanying notes 106-10 & 119-21 *infra*.

103. *See, e.g., Progress Review, supra* note 39, at 351, where Pedro Roffe defines the dispute concerning the legal character of the Code as being between Group B and the Group of 77, and *compare* text & accompanying notes 110-13 *infra*.

of the elaboration of the Draft International Code of Conduct on Transfer of Technology. First, however, several preliminary remarks are in order.

It must be remembered that socialist nations have long insisted international law not be made without the participation of all major blocs, including the socialist bloc,[104] and have regularly participated in the elaboration of most significant international instruments. Nevertheless, Group D did not submit its own draft of the Code until two years after the initial submission of the Group B and Group of 77 drafts,[105] thus permitting the issues to be framed and agenda set without active socialist participation. This hesitance to enter the fray is most unusual, and significant. The socialist nations allowed the stage to be set for a confrontation between developing and western developed nations without having to present their own views in writing and without having to delineate a socialist position on the majority of issues being negotiated. By allowing the other two major negotiating units to put forward drafts first, the socialist nations were able to see which of their interests would be adequately protected by the Group B draft without need for any special effort on their own part. They were also able to see precisely which of the Group of 77 proposals they could endorse in their own belated draft without endangering their technology supplier interests.

With regard to their role as suppliers, Group D negotiators have been interested in ensuring "effective protection of industrial property rights."[106] Though this language seems to reflect the underlying perspective of Group D, it did not appear in the Group D draft. It was offered, however, as a socialist alternative to a section of the Code in dispute between Group B and Group of 77 negotiators.[107] In offering this language Group D managed to ally itself, in effect, with Group B without explicitly adopting Group B language.[108] For the most part, the technology suppliers (of Groups B

104. *See* Hazard, *Soviet Tactics in International Lawmaking*, 7 DENVER J. INT'L L. & POL'Y 9, 21-22 (1977).

105. *See* text & accompanying notes 73, 75-76 *supra*.

106. Composite 1978 Draft, *supra* note 77, at 10.

107. Group B also proposed to "ensure effective protection of industrial rights." *Id.* at 9. The Group of 77 proposed to "ensure an equitable balance between the needs of economic and social development, particularly of the developing countries, and the rights granted by industrial property." *Id.*

108. While both Group B and Group D proposed to "ensure effective protection of in-

and D) won on this point.[109]

With respect to the legal nature of the Code, which will determine the effect to be given all other provisions, Group D has consistently advocated a code which would be "optional and allow for flexibility"[110]—that is, one which is non-binding. While attempting to have the question of the Code's legal character "set aside for the time being," a representative of Group D indicated that "he felt that a code consisting only of guidelines [such as proposed by Group B] would be too weak; it should contain a set of rules."[111] No explanation of how non-binding rules would be stronger than non-binding guidelines was ever offered,[112] yet the appearance was left of Group D being critical of western developed nations for avoiding the promulgation of "rules." Nevertheless, Group D has consistently supported the principle that the Code be non-binding.[113]

During the effort to elaborate the Code there have been nu-

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dustrial property rights," Group B's proposal concluded with "and other rights of parties involved in the transfer of technology," while Group D's proposal concluded with "and other related rights." *Id.* at 9-10. The two proposals are the same in substance, but Group D was able to distance itself from Group B by merely choosing different words with identical effect.

109. The language eventually agreed upon by all negotiating parties and appearing in the 1980 Composite Draft reads as follows: "Each country . . . should *ensure an effective protection of industrial property rights* granted under its national law and other related rights recognized by its national law." Composite 1980 Draft, *supra* note 77, at 9 (emphasis added).

110. *Experts' Report No. 1, supra* note 30, at 7 (statement of the spokesman for the experts from countries that are members of Group D).

111. *Id.* at 14 (statement of the spokesman for countries that are members of Group D).

112. Presumably, the use of the term "rules" is a reflection of the Soviet jurisprudential perspective that international law is built upon a hierarchy of norms, one level of which is referred to as consisting of "rules." For an overview of Soviet thought on the hierarchy of norms in international law, *see generally* Alexidze, *Jus Cogens*, COLLECTED COURSES HAGUE ACAD. INT'L L. (for the year 1981) (forthcoming); Tunkin, *International Law in the International System*, 147 COLLECTED COURSES HAGUE ACAD. INT'L L. (1975). Tunkin, a leading Soviet international lawyer, however, has written:

> [e]ven if such a rule of conduct does appear it does not necessarily become a judicial norm; it may merely be a norm of international ethics or a norm of international courtesy . . . . A rule of conduct, being the result of universal practice, becomes a customary norm of international law only if it has been accepted or recognized by the states as juridically binding as a norm of law.

Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419, 420, 422-23 (1961) (footnote omitted). It would thus appear that a non-binding set of "rules" would be no stronger than a non-binding set of "guidelines."

113. *See* text & accompanying note 110 *supra*.

merous disputes concerning choice of language between "should" and "shall."[114] Group B, advocating a non-binding code, has consistently supported use of the word "should" to describe the obligations of technology suppliers; the Group of 77, on the other hand, advocates formulation of the Code as a binding international treaty, and has consistently supported the word "shall" to describe obligations to be undertaken by suppliers.[115] Group D, however, has staked out for itself a rather unusual but effective position. While insisting on a non-binding code, Group D regularly joined the Group of 77 in supporting utilization of "shall" to describe suppliers' obligations.[116] Thus, Group D has managed to maintain its fundamental position of advocating a non-binding legal character for the Code, but has also supported Group of 77 language in instances where Group B has taken a principled, but essentially useless, position of opposition.

The Group D strategy can best be understood when compared to Group B negotiating practice concerning the choice of "should" or "shall." There are only three conceivable reasons for the Group B nations' insistence on use of conditional language. First, they may expect to be unable, in the end, to prevent the Code from being binding and therefore, to protect suppliers, need to insist on precatory language to describe the obligations undertaken. They would thus weaken what would otherwise be, in their view, an unacceptably rigid treaty. It is unlikely, however, that the Code will become binding hard law in the face of joint Group B and Group D opposition. The socialist nations, realizing they will win

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114. The should/shall dispute occurs at eight locations in the Composite 1978 Draft, *supra* note 77, and eight locations in the Composite 1980 Draft, *supra* note 77. Among the sections of the Code where this language is most in dispute are the chapters on restrictive business practices and supplier guarantees. In each instance Group B supports use of "should" and the Group of 77 and Group D support "shall." Similarly, in paragraph 11 of the Preamble, Group B would have "all countries *encourage* that their enterprises, whether public or private, *follow* in all respects the provisions of [the] code," while the Group of 77 and Group D would have "all countries *ensure* that their enterprises, whether public or private, *shall conform* in all respects to the provisions of [the] Code." Composite 1980 Draft, *supra* note 77, at 2 (emphasis added). The analysis presented in the text regarding "should" and "shall" would apply equally to this preambular language.

115. *Id.* "[I]n law a world of difference exists between a legally binding instrument and one the observance of which depends wholly on the good will of the States concerned." Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 33 (1965). Bin Cheng goes on to warn that "[p]seudo law can be the worst enemy of the rule of law." *Id.* at 48.

116. Composite 1980 Draft, *supra* note 77.

the more significant battle for a non-binding legal character for the Code, are willing to give in on the relatively insignificant choice of grammatical mood. The use of mandatory language in a non-binding code does not discernably strengthen the obligations of the parties.[117] Group B is thus left, isolated, to fritter away its political goodwill re-fighting a war already won. Second, Group B negotiators may fear that the final text of the Code will leave the legal character ambiguous and thus they may wish to ensure recognition of the Code as a non-binding agreement by filling it with precatory language. But, "[g]overnments may enter into precise and definite engagements as to future conduct with a clear understanding . . . that the agreements are not legally binding."[118] The Code's *travaux preparatoires* already manifest the clear intention of Groups B and D that the Code be non-binding and therefore the likelihood of an ambiguous legal character is, at best, slight indeed. Third, Group B may intend to withdraw its objection to a binding code. No hint of such a major concession has yet been revealed by Group B negotiators. Moreover, it would be disingenuous for Group B to agree to a legally binding treaty filled with precatory language, and no political gain could be expected from such maneuvering. Thus, one may conclude there is little to be gained from insistence on use of the word "should," and much to be lost by fighting such useless battles. Group D negotiators have clearly understood this well, and have conducted themselves accordingly.

Group D has only rarely put itself in direct opposition to the Group of 77, and has done so only when a priority interest was at stake. Thus, in conjunction with Group B, Group D opposed inclusion in the Code of language, suggested by the Group of 77,[119] limiting possible circumvention of the Code's provisions by way of bilateral or multilateral intergovernmental agreement.[120] In view of the extreme significance of intergovernmental agreements to so-

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117. *See* note 112 *supra.*

118. Editorial Comment—*The Twilight Existence of Nonbinding International Agreements,* 71 AM. J. INT'L L. 296, 299 (1977) (by Oscar Schachter).

119. Composite 1980 Draft (proposed para. 1.6 of the Group of 77), *supra* note 77, at 5 n.5.

120. The text proposed by the Group of 77 reads as follows: "Bilateral and multilateral agreements between States on the transfer of technology for meeting socio-economic needs of development in accordance with the chapters on objectives and principles and special treatment, should be consistent with the Code." *Id.*

cialist procedures for technology transfer,[121] opposition to this Third World proposal was to be expected. Indeed, this is yet another example of Group D expending political capital only when absolutely necessary.

As mentioned above,[122] the socialist nations need to protect two different sets of interests: their interests as technology suppliers to developing nations and their interests as potential recipients of western technology. With regard to their role as technology recipients, the socialist nations have strongly and repeatedly advocated inclusion in the Code of a section prohibiting discrimination, whether political or economic, by technology suppliers.[123] This was clearly an attempt to proscribe western national export controls that have long interfered with Soviet efforts to import high-technology.[124] The Soviet-proposed language proscribing such discrimination was, however, invariably tied with language supportive of Third World desires that the traditional litany of developing nations' rights be respected.[125] Thus, the major demand of the social-

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121. *See* text & accompanying notes 54-57 *supra.*

122. *See* text & accompanying notes 62-67 *supra.*

123. The Group D call for inclusion in the Code of a section prohibiting political discrimination appears throughout the records of the drafting sessions. *See, e.g., Experts' Report No. 2, supra* note 70, at 4, 8; *Experts' Report No. 4, supra* note 70, at 7; *Experts' Report No. 5, supra* note 70, at 6, 16; *Experts' Report No. 6, supra* note 70, at 4, 14. The Group D Draft provided: "The transfer of technology shall be based upon observance of the principles of equality, mutual benefit, respect for national sovereignty and the goals of economic and social development for all States, and *shall exclude the use of political, economic and other kinds of discrimination.*" Group D 1977 Draft, *supra* note 76, at 8 (Chapter IV: Exclusion of Political Discrimination and Restrictive Business Practices) (emphasis added).

124. Note, *U.S. Technology Transfers to the Soviet Union and the Protection of National Security, supra* note 64, at 1037. Sudden changes of political mood in the West, recently seen after the 1979 Soviet invasion of Afghanistan and again after the 1981 imposition of martial law in Poland, and the resulting limitations on Soviet access to western technology, are thought to be particularly troublesome to Soviet state planners. *See* Fomin, *supra* note 5, at 8-9. *See generally* Note, *An Overview of Export Controls on Transfer of Technology to the U.S.S.R. in Light of Soviet Intervention of Afghanistan, supra* note 62, at 555. Most recently, the Reagan Administration has attempted to prevent Soviet access to western technology needed for an oil and gas pipeline to Western Europe.

125. The Group D Draft proposes prohibiting discrimination, particularly in the form of:

> (i) restrictions adopted on account of different economic and social systems of the party countries or levels and their chosen ways of economic and social development;
>
> (ii) *restrictions representing an attempt to infringe the national sovereignty of partner countries or a threat to their political or economic independence,* in-

ist nations was presented in the guise of support for Group of 77 positions, and Soviet substance was masked by Soviet form.

CONCLUSION

Perhaps the greatest problem facing international lawyers today is the difficulty in using law to resolve problems that are fundamentally political and based on uneven distribution of power. Nowhere is this more evident than in the attempt to create a New International Economic Order, particularly as it relates to the transfer of technology. The Group of 77 appears to believe that the negotiations on the proposed Code of Conduct on Transfer of Technology will successfully lead to an internationally binding instrument that will resolve the current imbalance in technology transfer negotiating strength. Unfortunately, the same imbalance also marks the negotiations on the Code.

It is true that a coalition comprised of the Group of 77 and Group D could create a majority with the capability of using the negotiations to make law, or, more accurately, to influence strongly the making of law.[126] At times the negotiating process has revealed the appearance of such an alliance. As seen above, however, this appearance is, in fact, illusion. Group D members have their own interests regarding technology transfers, whether as suppliers or recipients, and the Group's role in the negotiations is shaped by these interests rather than the interests of the developing nations. Thus, rhetoric aside, the Third World is, with regard to the most important outstanding issues, faced with a Group B and Group D united front.

On the crucial issue of the legal character of the Code, it seems

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cluding their implementation of plans and their achievement of developing goals;
(iii) *restrictions hindering the restructuring of international economic relations on a just and equitable basis;*
(iv) restrictions hampering the development and strengthening of the national technological capacity of technology-receiving countries, *especially developing countries,* or impeding the desire of technology suppliers to contribute towards the strengthening of that capacity;
(v) restrictions aimed at creating and preserving technological dependence of technology-receiving countries, *especially developing countries,* or imposing upon them a technology which does not conform to their social and economic conditions and development objectives.

Group D 1977 Draft, *supra* note 76, at 8 (emphasis added).

126. *See* Hazard, *supra* note 104, at 11.

highly likely that the Group of 77 will not attain its goal of an internationally binding instrument. Without the force of binding law the Code will have a diminished impact and will not lead to meaningful restructuring of the international economy. Nevertheless, even non-binding international law can be of some utility,[127] and likely these negotiations, and the Code that they will produce, will have some positive effect on future technology transfer arrangements. Some of the evils of the present system will be redressed, but the fundamental inequality of power will not be corrected, and the New International Economic Order will not be established as a result of this Code. Dramatic progress, desperately though it may be needed, will not occur until the international economic crisis becomes so bad that the member nations of all major negotiating blocs come to realize that it is in their collective enlightened self-interest[128] to bring about radical change.

127. On the value of non-binding international law, *see generally* Dupuy, *Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law,"* in DECLARATIONS OF PRINCIPLES: A QUEST FOR PEACE 247 (R. AKKERMAN, P. VAN KRIEKEN & C. PANNEBORG, eds. 1977); Editorial Comment—*The Twilight Existence of Nonbinding International Agreements, supra* note 118, at 296. The Soviets apparently see some value in customary rules of conduct which have not yet achieved the status of customary norms of international law. *See, e.g.,* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law, supra* note 112, at 419-23.

128. For a discussion of "mutual interest" in structural change of the global economy, *see* Brandt Commission, *supra* note 3, at 7-47.